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Summary record of the 918th meeting

Held at Headquarters, New York, on Thursday, 1 July 2010, at 3 p.m.

Chairperson: Mr. Wisitsora-at ..... (Thailand)

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The meeting was called to order at 3.15 p.m.

Possible future work in the area of insolvency law (*continued*) (A/CN.9/709; A/CN.9/WG.V/WP.93 and Adds.1-6)

1. **Mr. Tysebaert** (Observer for Belgium) said that his delegation could support the proposal by the United States of America (A/CN.9/WG.V/WP.93/Add.1), particularly regarding determination as to the location of the Centre of Main Interest (COMI), an issue which gave rise to many disputes and in respect of which a more harmonious approach was needed. His delegation had reservations about taking up the question of directors' and officers' responsibilities. Although that issue was undeniably important, there was a risk that discussion would move into very different areas such as good governance, civil liability and criminal law. If the Commission decided to take up the issue, it must clearly delineate the mandate of the Working Group. As to the Swiss proposal (A/CN.9/709), that issue was being considered by other bodies and the Commission should await the outcome of their work before taking it up.

2. **Mr. Bellenger** (France) said that his delegation had reservations about the United States proposal; insolvency law issues had been considered many times in the past and it was not clear whether the Working Group would be able to advance beyond the Model Law on Cross-Border Insolvency or the regulations developed by the European Union. The issues were so delicate that it would be difficult to achieve satisfactory results; in the absence of innovative ideas, it might be better to avoid them.

3. His delegation could support the proposal to take up the question of directors' and officers' responsibilities since that was a fairly new concept. It could also accept the Swiss proposal for the preparation of a study on the feasibility of an instrument regarding the cross-border resolution of large and complex financial institutions. Even if other bodies were working on the topic, the Commission could also develop its views.

4. **Mr. Soo-Geun Oh** (Republic of Korea) said that his delegation believed that the topics proposed by the United States of America and by the United Kingdom were both worthy of consideration. In terms of the feasibility of undertaking work on them, however, he observed that while the question of COMI was of universal concern, the question of directors' and officers' responsibilities might be excluded in some jurisdictions so that there could be controversy as to whether it should be taken up by the Working Group. His delegation therefore believed that priority should be given to the United States proposal.

5. **Mr. Burman** (United States of America) said that many of the successful and effective products developed by Working Group V and adopted by the Commission had been very difficult at the outset; his delegation did not believe that its proposal was too complex for the Commission to undertake.

6. While some aspects of the topic of directors' and officers' responsibilities would not be relevant or appropriate for consideration by the Commission, those aspects would not be included in the work. His delegation supported the Swiss proposal for the preparation of a study, which would indicate the extent to which there might be a need for the elaboration of general principles being developed by other bodies. The study should be carried out when resources became available, and the secretariat might wish to invite expert groups to participate in the work.

7. **Mr. Morán Bovio** (Spain) said that the Commission needed to determine whether directors had specific duties in relation to insolvency; if there were no such duties, the Commission would have to consider all the duties of directors. If the Commission wished to define the duties of directors in certain circumstances it would have to revisit the Legislative Guide, in particular recommendations 16 to 18. Accordingly, his delegation believed that there was no justification for the Working Group to take up the issue.

8. **Mr. Chan** (Singapore) said that while, in some countries, the liability of directors to be disqualified arose only in connection with insolvency proceedings, in other countries, including Singapore, such liability arose in many other contexts, for example, failure to exercise due diligence, which could give rise to disqualification and other civil and criminal liabilities. If the Working Group was to address the general issue of the civil and criminal liabilities of directors it would be going well beyond its mandate. The liabilities of directors under civil and criminal law and disqualification, which was quasi-criminal in nature, were all governed by domestic law so it was hard to see how it would be possible to determine liability on a transnational basis.

9. **Ms. Sanderson** (United Kingdom) said that the Commission would have to be careful to consider directors' duties only in relation to insolvency; paragraph 16 of her delegation's proposal clearly referred to directors' and officers' responsibilities and liabilities in insolvency, including prior to entering formal insolvency proceedings, not to their general duties. That was a very important area of work which was much needed within the international community. As to the view that liability was a domestic issue, her delegation believed that provisions were needed to ensure that directors took responsibility for their conduct and that any liability or restrictions that might apply to that conduct also applied across borders and potentially internationally.

10. **Mr. Cooper** (International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL)) said that the United Kingdom proposal clearly concerned only the duties of directors during and immediately prior to insolvency and would not involve issues of criminal law. Clarification was needed about such issues as the obligation of directors to commence insolvency proceedings and liability for wrongful trading and losses to creditors. The threat of liability was a powerful tool in relation to restructuring, which also fell within the Working Group's mandate.

11. **Ms. Leblanc** (Canada) said that the issue raised in the United States proposal was very complex; it was hard to envisage how the current uncertainties could be overcome. Her delegation supported the proposal regarding directors' and officers' responsibilities; since the work would be carried out by the Working Group on Insolvency, it would clearly be confined to that context. With regard to the Swiss proposal, her delegation would not object to the preparation of a study but believed that the work should be undertaken only when the work of other international organizations had been completed or was sufficiently advanced for duplication to be avoided. In view of the limited resources available, the question of directors' and officers' responsibilities should take precedence over the study proposed by Switzerland.

12. **Ms. Rogne** (Norway) said that her delegation believed that neither topic should be excluded from further consideration by the Working Group; the discussions in the Commission demonstrated that both issues deserved further consideration. The Working Group should be given the flexibility to decide on the scope of its work.

13. **Mr. Chan** (Singapore) said that even if the scope of the work was confined to insolvency, the Working Group would also have to consider the period prior to insolvency, and in both cases, other liabilities of directors and officers would apply, so there was clearly an overlap with general duties. If the liability of directors or officers was to be enforced in different jurisdictions, issues of criminal law, and of the extraterritoriality of criminal laws, would arise; those issues went beyond the Commission's mandate.

14. **Mr. Schoefisch** (Germany) said that, in his view, the Swiss proposal was not a priority for the immediate future. On the United Kingdom proposal, his delegation believed that the Working Group should focus exclusively on liability with respect to insolvency.

15. **Mr. Ghia** (Italy) agreed that the topic of liability of directors should be kept within the context of insolvency. While the centre of main interest was an important topic that was well known in the European context, the subjects proposed by the United Kingdom and INSOL were of even greater importance, as they related to situations that could have major consequences for people all around the world.

16. **Mr. Mokal** (World Bank) said he wished to reassure the representatives of Spain and Singapore that it was possible to maintain a distinction between criminal law and civil liability in respect of the responsibilities of directors and other officers. A further distinction should be made between the commencement of formal insolvency proceedings, on the one hand, and the occurrence of factual insolvency, on the other. The latter often happened first. In the period between the two, directors should have specific responsibilities to creditors and indeed many legal systems attached great importance to their obligation to take into account the interests of creditors. In that connection numerous practical questions arose as to, for example, the circumstances that would trigger the duty of directors to take into account the interests of creditors in addition to those of shareholders and whether directors owed such a duty to the creditors as a group, to only some creditors or to the company. Such questions had a crucial impact on the incentives of directors of distressed companies and the ability of insolvency representatives to conduct insolvency

proceedings. There was therefore much for the Working Group to consider from the strict perspective of insolvency.

17. **Ms. Sanderson** (United Kingdom) said it was not her delegation's intention that liability under criminal law should be discussed. The Working Group should endeavour to determine when insolvency occurred and at what moment might directors become liable. Some rules were in place in different countries and it would be beneficial to exchange experiences with a view to identifying best practices.

18. **Mr. Soo-Geun Oh** (Republic of Korea) said that in many jurisdictions the liability of directors was dealt with in corporation law, criminal law or civil law. His delegation believed that, instead of tackling such a difficult issue, the Working Group should take up the issue of the centre of main interest.

19. **Ms. Lim Ai Nei** (Singapore), referring to the first sentence in paragraph 6 of document A/CN.9/WP.93/Add.3, said she did not see how the concerns of individual directors with regard to their personal liability fell within the purview of UNCITRAL. She emphasized the importance of delineating the issue clearly and narrowly.

20. **Ms. Smyth** (Australia) said her delegation was confident that the Working Group could deal appropriately with the issue of directors' liability, focusing on civil liability in insolvency and pre-insolvency. She welcomed the flexibility shown by other delegations and expressed the conviction that countries could benefit greatly from each other's experience in dealing with the matter.

21. **Mr. Morán Bovio** (Spain) urged the members of the Commission, before they took a decision to undertake work on the liability of directors and other officers, to consider the practical difficulties of dealing with the topic.

22. **The Chairman** said that the discussion showed that the United States and Swiss proposals enjoyed clear support. With regard to directors' liability, while a majority supported work on the topic, there was also a consensus that the consideration of criminal law aspects should be avoided. The mandate for that topic should therefore be linked directly to insolvency and not to general fiduciary duties.

23. **Mr. Chan** (Singapore) said that the mandate of the Working Group must make it clear that criminal law issues were not to be considered. Addendum 4 to the working paper (A/CN.9/WP.93/Add.4) did place emphasis on criminal liability, and he therefore welcomed the clarification provided by the representative of the United Kingdom.

24. **Ms. Clift** (International Trade Law Division) said that the secretariat wished to seek the approval of the Commission for a project it had in mind to undertake. In the judicial colloquia on insolvency that UNCITRAL had held, judges often expressed their desire to have guidance on cross-border issues and on how the Model Law on Cross-Border Insolvency operated. With the assistance of a high court judge from New Zealand, the secretariat had drafted a paper setting forth judicial perspectives on the interpretation of the Model Law. The secretariat wished to consult on the paper with judges and insolvency practitioners in order to bring it to the stage where it could be considered by the Working Group. Consideration of the paper in the Working Group should take only a few hours during one of its sessions; thereafter the paper could be referred to the Commission for endorsement. A Practice Guide could be addressed to practitioners and another text to judges.

25. **Mr. Lifland** (United States) strongly endorsed the project proposed by the secretariat. Specialty judges in the United States would welcome a primer on the subject, which would provide clarity and benefit judges worldwide.

26. **Mr. Cooper** (International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL)) said that guidance on the subject of cross-border insolvency would be of enormous value. He mentioned that the next judicial colloquium on insolvency would be held in Singapore in March 2011.

27. **Mr. Morán Bovio** (Spain) supported the secretariat's proposal.

28. **Ms. Smyth** (Australia) requested clarification on the decision with regard to the Swiss proposal. Her delegation had concerns about the timing of work and understood that the study would be carried out subject to the available resources.

29. **Ms. Clift** (International Trade Law Division) said that the secretariat's resources would not permit work on the Swiss proposal to be completed in time for the December session of the Working Group. It might be

possible to produce something for the following year. It would be useful to wait to see whether work being carried out on the same topic by other organizations, such as the Group of 20, would come to fruition before the end of the year.

30. **Mr. Burman** (United States) said he was comfortable with the secretariat's explanations. Work on the topic proposed by Switzerland should be subject to the available resources and other established priorities. It was not even critical to have a final product on the topic by the Commission's next session. There should be effective coordination and collaboration with other international bodies such as IMF and the World Bank.

31. **The Chairman** said that the discussion and conclusions would be reflected in the draft report on the item, which would be taken up at the next meeting.

The meeting rose at 4.35 p.m.